No. 12,455

IN THE

United States Court of Appeals

For the Ninth Circuit

JIM YUEN JUNG,
Appellant,

vs.

BRUCE G. BARBER, District Director for the Immigration and Naturalization Service, San Francisco,
Appellee.

BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

Appellant filed a petition for naturalization under the provisions of Section 324(a) of the Nationality Act of 1940 (Public Law No. 853, 76th Cong.) in the United States District Court for Northern District of California, Southern Division, on the 9th day of November, 1949 (T. 2). His petition for naturalization was denied by District Judge Louis E. Goodman on November 30, 1949 (T. 20). Notice of appeal was filed with the Clerk of the above-entitled Court on December 7, 1949 (T. 20).

Jurisdiction of the District Court to entertain the petition for naturalization is conferred by Section 301 of the Nationality Act of 1940 (8 U.S.C.A. 701). Jurisdiction of the Court of Appeals to review the District Court's final order is conferred by Section 128 of the Judicial Code, as amended (28 U.S.C.A. 1291).

The order of the District Court in denying the petitioner's application for United States citizenship is a final decision within the meaning of Section 128 of the Judicial Code. (See *Tutun v. U. S.,* 270 U.S., 568, 46 S. Ct. 425, 70 L. Ed. 738; *U. S. v. Rodick,* 162 F. 469).

STATEMENT OF THE CASE.

The petitioner first arrived in the United States at the Port of San Francisco, ex SS "President Coolidge," on March 13, 1941, seeking admission as a native born United States citizen; the appellant's application for admission was denied by a Board of Special Inquiry on the ground that he was an alien and not in fact a citizen of the United States when it was determined that the documents presented were forgeries; an appeal from such excluding decision was dismissed by the appropriate administrative authorities; the appellant was released under bond inasmuch as deportation could not be effectuated at that time due to war conditions.

The petitioner filed his Selective Service Questionnaire on July 2, 1942, stating that his residence was at

Cincinnati, Ohio, and his birth in San Francisco, California, on July 12, 1912; this questionnaire contained a notation that the subject was on temporary leave under bond from the immigration authorities; occupational deferment was requested and received. In April, 1945 the petitioner started management of a restaurant in San Francisco without notifying his draft board of a change of address and occupation. On October 1, 1945, he was apprehended for violation of the Selective Service Act; he was found guilty by the Honorable District Judge Louis E. Goodman and sentenced to serve six months at McNeil Island;

On May 17, 1946, petitioner was inducted into the Army of the United States; the Army records at the time of induction show the petitioner claimed to have been born at San Francisco, California, on July 12, 1912; on May 28, 1946, eleven days after induction, in response to an inquiry, the Army was advised by the Immigration and Naturalization Service that the petitioner herein was in fact an alien and a native and citizen of China; under date of July 2, 1946, the Immigration and Naturalization Service at San Francisco were advised, in reply to their correspondence, by the petitioner's Army organization that: "No action effecting his discharge is anticipated and the only Army Regulation governing this case, AR 615-366, makes no provision for discharges of this nature"; the subject is still carried on the records of the Army as a native of San Francisco.

Petitioner has served continuously in the United States Army from the date of his induction, May 17,

1946, and was still serving in the United States Army on the date of the filing of this petition for naturalization; during this time petitioner completed three years of service and was honorably discharged on May 16, 1949; he reenlisted on May 17, 1949, for an additional period of three years under which enlistment he is now serving.

On November 9, 1949, petitioner and two verifying witnesses appeared before a representative of the Immigration and Naturalization Service and were examined, said verifying witnesses being citizens of the United States who identified petitioner as the person who rendered military service upon which this petition is based.

On November 9, 1949, petitioner presented a duly authenticated copy of the record of the United States Army covering the petitioner's service in the United States Army from May 17, 1946, to November 9, 1949, such copy showing the period of petitioner's service and that such service was performed under honorable conditions.

The appellant's petition for naturalization was filed, and upon recommendation of the Immigration and Naturalization Service for denial, was denied by the Honorable Louis E. Goodman, United States District Judge, on November 30, 1949, for the reason that the said petitioner "has failed to establish that he is a person of good moral character as required by Section 324(a) of the Nationality Act of 1940."

SPECIFICATION OF ERRORS.

1. That the District Court erred in finding that said petitioner had not established good moral character as required by Section 324 of the Nationality Act of 1940 (8 U.S.C. 724).

2. That the District Court erred in denying appellant's petition for naturalization as a citizen of the United States.

SUMMARY OF ISSUES AND LEGAL ARGUMENT.

It is appellant's contention that Section 324 of the Nationality Act of 1940 provides that any person who has served in the Armed Forces of the United States continuously for an aggregate of at least three years and who is presently serving therein need not establish good moral character other than showing that such period of service was conducted under honorable conditions; and that duly authenticated copies of the records showing such service are conclusive evidence of the conditions prescribed.

ARGUMENT.

The question involved in this case appears to be one of first impression making it necessary to review the history of the naturalization process in order to reach a proper conclusion in this matter.

The Constitution of the United States, Article I, Section 8(4) grants Congress the power "to establish

a uniform rule of naturalization." Pursuant to such authority, Congress exercised that power and in 1940 enacted a complete new codification of the nationality and naturalization statutes. The general objects of that Act were to consolidate, rearrange, and provide a comprehensive administration of the naturalization laws. Insofar as we are presently concerned, it provides for uniform provisions under which persons serving honorably for at least three years in the Armed Forces of the United States can be naturalized and that certified copies of the records of service shall be accepted in lieu of the usual affidavits and testimony of witnesses.

The present legislation is not the first time that Congress has provided a special class of naturalization for the benefit of members of the Armed Forces. For years they granted certain benefits and exceptions for persons who served in the military or naval forces.[1] In substance it would appear that many of the statutory qualifications imposed on the ordinary alien before being granted the privilege of naturalization have been waived or modified by Congress for the specific purpose of providing less onerous terms for

[1]Section 2166, R. S. U. S., as amended by sec. 2, act of May 9, 1918, 40 Stat. 547; U. S. C., title 8, sec. 395; sec. 4, act of June 29, 1906, as amended by the act of May 9, 1918, 40 Stat. 542-546; as amended by sec. 6 (d), act of March 2, 1929, 45 Stat. 1514, and sec. 2, act of May 25, 1932, 47 Stat. 165; U. S. C., title 8, sees. 388 to 394, inc.; (U. S. C., title 8, sec. 388). Act of July 19, 1919, 41 Stat. 222; sees. 1 and 7, act of May 26, 1926, 44 Stat. (pt. 2) 654, 655; U. S. C., title 8, sec. 241; sec. 3, act of March 4, 1929, 45 Stat. 1546; U. S. C., title 8, sec. 392a; sec. 1, act of May 25, 1932, 47 Stat. 165; U. S. C., title 8, sec. 392b; act of June 24, 1935 (Public. No. 160, 74th Cong.), and act of June 24, 1935 (Public, No. 162, 74th Cong.).

those who have rendered honorable military service for the United States.

It has been held that the privilege of naturalization ripens into a right when the petitioner complies with all the conditions prescribed by Congress.[2] The question before us is: What are the conditions prescribed by Congress for a person who is now serving in and has for more than three years past served honorably in the armed forces of the United States?

In the ordinary naturalization case the petitioner must comply with the statutory provisions of Section 307(a) of the Nationality Act of 1940 (8 U.S.C. 707(a)). This part states that a petitioner must establish that he has been a person of good moral character for the required period of residence, i.e., five years. It is contended by appellant that he is removed from the provisions of this part by the specific provisions of Section 324 of the same Act.

Where the statutory language is not plain, the courts may look to the legislative history for further evidence of the legislative intent, in order to determine the policy of the legislation as a whole.

Chatwin v. U. S., 326 U.S. 455, 464;
U. S. v. Rosenblum Truck Lines, 315 U.S. 50, 55.

The Congressional debates on the pertinent provisions of the Nationality Act of 1940 shed little

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[2]*U. S. v. Schwimmer* (Ill.), 49 S. Ct. 448, 279 U. S. 644, 73 L. Ed. 889, reversing (C. C. A.) *Schwimmer v. U. S.*, 27 F. (2d) 742, certiorari granted *U. S. v. Schwimmer*, 49 S. Ct. 80, 278 U. S. 595, 73 L. Ed. 526; *Tutun v. U. S.* (Mass.), 46 S. Ct. 425, 270 U. S. 568, 70 L. Ed. 738.

light on the subject. The Act was passed by both the House and the Senate with little debate and practically no changes. The proposed law was drafted after long and lengthy hearings and discussions by members of the House and representatives from the Department of States, Office of the Attorney General, and the Department of Labor.

During the subcommittee's hearing, a report of the Committee of Advisors which contained the proposed code with explanatory comments was given due consideration. The complete comments were published along with the hearings conducted by the Committee on Immigration and Naturalization, House of Representatives, 76th Congress.[3] At page 436 and 437 in the cited publication the following appears:

> "Proposed section 307(a) continues the present requirements as to continuous residence within the United States for at least 5 years immediately preceding the filing of a petition for naturalization, and such continuous residence also from the date of filing the petition until admission to citizenship (subd. 4, sec. 4, act of June 29, 1906, 34 Stat. 598, as amended by a part of sec. 6(b), act of March 2, 1929, 45 Stat. 513-514; U.S.C., title 8, sec 382)."

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[3]Publication by United States Government Printing Office, Washington, 1945—To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code, Hearings before the Committee on Immigration and Naturalization, House of Representatives, Seventy-Sixth Congress, First Session on H. R. 6127 superseded by H. R. 9980, a Bill to revise and codify the Nationality Laws of the United States into a comprehensive nationality code, January 17, February 13, 20, 27, 28, March 5, April 11, 16, 23, May 2, 3, 7, 9, 13, 14, and June 5, 1940.

"The 5-year residence requirement has been a part of the naturalization statutes almost continuously from 1795. It is based upon the belief that a newcomer before being admitted to citizenship should remain in this country sufficiently long to establish his standing in the community, to learn the language, and to understand and appreciate the essential facts and meaning of its history and nature and principles of its Government. No material reason has been advanced for a change in this respect, except as to a few special groups of persons where the conditions would not appear to require 5-years' probation."

"There have been continued the stipulations that during all the period of necessary residence the applicant for naturalization must prove that he has been of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States. These requirements also have been a fundamental part of our naturalization history since 1795 (subd. 3, sec. 1, act of January 29, 1795, 1 Stat. 414)."

The foregoing excerpt when considered with the language of Section 324(a), (b), (c), and (e) shows that it was the Congressional intent that the statutory requirement of good moral character shall be proved in this type of case by the duly authenticated copy of the record of honorable service (Appendix pp. i-ii). In Section 324 three years' service in the armed forces has been substituted in lieu of the usual requirement concerning the normal period of residence.

Referring to subparagraph (c), it is noted that Congress specifically provided that where the service was not continuous the petitioner must establish in the usual manner his good moral character, attachment, and favorable disposition *only* between the periods of petitioner's service. This is clearly another indication of the Congressional intent to limit the scope of required proof in this type of case.

In the instant case the petitioner has served continuously in the United States Army for more than three years; upon termination of his original enlistment he was separated under honorable conditions; and he immediately reenlisted for an additional period of three years which he is presently serving. A duly authenticated copy of his record of service for the required period and his discharge under honorable conditions was presented to the Court for its consideration.

Congress granted the Commissioner of Immigration and Naturalization the authority to prescribe such rules and regulations as might be necessary to carry into effect the provisions of the naturalization chapter (Section 327, Nationality Act of 1940; 8 U.S.C. 727(b)). (Appendix p. iii). Pursuant to such authority 8 C.F.R. 334.2 was adopted. The regulations contained therein are in perfect agreement and support the appellant's present contention. (Appendix p. iii). In addition, the designated examiner, during the course of examination of the petitioner in open court (T. 38), stated that it was the view of the Immigra-

tion and Naturalization Service that the period of proof of good moral character required is the period of residence required.

The Immigration and Naturalization Service objected to the petitioner's naturalization on the ground that there is an element of fraud and bad faith in connection with the enlistment in the service of the army itself, even though his actual service as a soldier was meritorious (T. 30).

It was decided by this Honorable Court in the case of *In re Fong Chew Chung,* 149 F2d 904, that the court could not go back of the honorable discharge. Here, in the instant case, the appellant was honorably discharged yet the government wants to find on nothing more than conjecture that such service was not performed under honorable conditions. The Immigration and Naturalization Service records show the Army was timely advised of the petitioner's alienage. The facts were before that administrative body within two weeks subsequent to the original enlistment and years prior to the issuance of the honorable discharge. The Immigration and Naturalization Service cannot attack the document and the court is bound by its finding.

Even though counsel has made an exhaustive diligent search for judicial authority on the subject, none can be found. We know that many thousands of veterans have been naturalized under the provisions of this part. Probably the logical explanation is that no court has heretofore challenged their right to this special dispensation granted by Congress.

The right of Congress to prescribe the scope of examination for those who seek the privilege of naturalization is without doubt. The appellant has performed a service or duty that Congress saw fit to reward with special benefits. Since the petitioner herein has met those qualifications how can it now be said that he is not eligible to that which Congress says he is entitled? The privilege of United States citizenship is cherished by all mankind, and a denial of that privilege, when all of the essential prerequisites have been met, is contrary to all of the legal concepts that form the foundation of our government.

PRAYER.

Wherefore, appellant prays that the decision of the District Court be reversed and that he be admitted to United States citizenship.

Dated, San Francisco, California,
March 6, 1950.

JACKSON & HERTOGS,
By JOSEPH S. HERTOGS,
One of Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

APPLICABLE STATUTES AND REGULATIONS.

The Nationality Act of 1940, as amended, so far as relevant to this proceeding (8 U.S.C. 324), provides:

"(a) A person, who has served honorably at any time in the United States Army, Navy, Marine Corps, or Coast Guard for a period or periods aggregating three years and who, if separated from such service, was separated under honorable conditions, may be naturalized without having resided, continuously immediately preceding the date of filing of such person's petition, in the United States for at least five years and in the State in which the petition for naturalization is filed for at least six months, if such petition is filed while the petitioner is still in the service or within six months after the termination of such service."

"(b) A person filing a petition under subsection (a) of this section shall comply in all respects with the requirements of this chapter except that——

(1) No declaration of intention shall be required;

(2) No certificate of arrival shall be required;

(3) No residence within the jurisdiction of the court shall be required;

(4) Such petitioner may be naturalized immediately if the petitioner be then actually in any of the services prescribed in subsection (a) of this section, and if, before filing the petition for naturalization, such petitioner and

at least two verifying witnesses to the petition, who shall be citizens of the United States and who shall identify petitioner as the person who rendered the service upon which the petition is based, have appeared before and been examined by a representative of the Service."

"(c) In case such petitioner's service was not continuous, petitioner's residence in the United States and State, good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during any period within five years immediately preceding the date of filing said petition between the periods of petitioner's service in the United States Army, Navy, Marine Corps, or Coast Guard, shall be verified in the petition filed under the provisions of subsection (a) of this section, and proved at the final hearing thereon by witnesses, citizens of the United States, in the same manner as required by section 309. Such verification and proof shall also be made as to any period between the termination of petitioner's service and the filing of the petition for naturalization."

"(e) Any such period or periods of service under honorable conditions, and good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during such service, shall be proved by duly authenticated copies of records of the executive departments having custody of the records shall be accepted in lieu of affidavits and testimony or depositions of witnesses."

Section 327 of the Nationality Act of 1940 provides in part as follows:

> "(a) The Commissioner, or, in his absence, a Deputy Commissioner, shall have charge of the administration of the naturalization laws, under the immediate direction of the Attorney General, to whom the Commissioner shall report directly upon all naturalization matters annually and as otherwise required."
>
> "(b) The Commissioner, with the approval of the Attorney General, shall make such rules and regulations as may be necessary to carry into effect the provisions of this chapter and is authorized to prescribe the scope and nature of the examination of the petitioners for naturalization as to their admissibility to citizenship for the purpose of making appropriate recommendations to the naturalization courts. Such examination shall be limited to inquiry concerning the applicant's residence, good moral character, understanding of and attachment to the fundamental principles of the Constitution of the United States, and other qualifications to become a naturalized citizen as required by law, and shall be uniform throughout the United States."

Part 334.2 of Title 8, Code of Federal Regulations, provides in part as follows:

> "* * * At the time the petition for naturalization is filed, the petitioner shall present duly authenticated copies of the records of the executive departments having custody of the records covering the petitioner's service in the United States Army, Navy, Marine Corps, or Coast Guard, which copies must show the period or periods of

such service and that it was performed under honorable conditions. Such duly authenticated copies of service records shall be accepted as proof of the good moral character, attachment to the principles of the Constitution of the United States of America, and favorable disposition toward the good order and happiness of the United States of the petitioner for the periods of such service. * * *''